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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 458

WILLIAM B. ENGLAND, a. k. a. WILLIAM BENJAMIN ENGLAND,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

William B. England, also known as William Benjamin England, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above styled case on April 13, 1967, affirming the judgment of the United States District Court for the Eastern District of Illinois and the sentence of imprisonment of Petitioner for violation of 26 U. S. C., Section 7201. On June 8, 1967, the Court of Appeals denied a petition for rehearing.

CITATION TO OPINION BELOW.

The judgment of the United States Court of Appeals is printed in Appendix B, infra. The opinion of the United States Court of Appeals is also printed in Appendix B, infra, and is reported at 376 F. 2d 381.

JURISDICTION.

Petitioner was tried and convicted on a one count indictment charging him with violation of 26 U. S. C., Sec. 7201 in the United States District Court for the Eastern District of Illinois (R. 5). The District Court entered judgment and sentenced him to three years imprisonment. On April 13, 1967, the Court of Appeals for the Seventh Circuit entered its judgment affirming the judgment of the District Court. On June 8, 1967, the Court of Appeals denied a petition for rehearing. On June 26, 1967, the United States Supreme Court ordered that the time for filing a petition for a Writ of Certiorari be extended to and including August 7, 1967. Petitioner invokes the jurisdiction of this Court to review the opinion and judgment of the Court of Appeals by a writ of certiorari under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

I.

In a one count criminal tax evasion case where the tax assessments for the 3 years involved were made after the Statute of Limitations had run, whether the government could use Petitioner's execution of the government's Waiver of Restrictions form and its Offer in Compromise form as evidence of the filing of a fraudulent return to avoid the Statute of Limitations on the late assessment for one of the three years.

II.

Whether it was reversible error for the District Judge to submit to the jury evidence of taxes allegedly owed by Petitioner for a year where the assessment was outlawed by the Statute of Limitations along with evidence of taxes owed in two other years where the assessments were proper.

III.

In a Criminal Tax Evasion case whether Tax Assessment Sheets showing interest and penalties allegedly owed by taxpayer in addition to delinquent taxes may be received in evidence.

STATUTES INVOLVED.

Title 26 United States Code, Section 7201.

Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Title 26 United States Code, Section 6501.

Limitations on Assessment and Collection.

(a) General Rule.

"Except as otherwise provided in this Section, the amount of any tax imposed by this title shall be assessed within three years after the return was filed. . . ."

(c) Exceptions.

"1. False return—in the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time."

STATEMENT.

(All Record references are to pages in certified copy of Appendix of Defendant-Appellant in Court of Appeals unless otherwise noted.)

The one count indictment charged petitioner and his son, William Bernard England, with attempting to evade the payment of income taxes owed by petitioner for the years 1944, 1945 and 1946 in a total amount of $27,032.00 more or less, "duly assessed against the said William B. England (and his wife) on February 4, 1955", by concealing the ownership of two pieces of real property owned by petitioner in East St. Louis, Illinois, and by wilfully making false statements about that ownership between June 27, 1955 and November 27, 1962, so that the government could not levy on the property to secure payment of the back taxes, in violation of 26 U. S. C., Section 7201 (Appendix A).

The jury rendered a verdict of guilty against each defendant but the convictions were reversed and remanded for a new trial (R. 1). At this second trial, ending June 24, 1966, petitioner was found guilty by the jury and his son was acquitted (R. 2). Petitioner appealed and the Court of Appeals for the Seventh Circuit affirmed the conviction (Appendix B).

The Assessment of the back taxes for all three years was made on February 4, 1955 (R. 71, 72). The returns were timely filed (R. 14). Petitioner claimed, therefore, that the Statute of Limitations had run on these assessments while the government claimed that its evidence of petitioner's filing fraudulent returns for the three years permitted assessments at any time.

The government introduced evidence that petitioner pleaded guilty to another indictment in 1954 charging him with filing false returns for 1945 and 1946 (R. 77, 78).

Concerning the year 1944, the government's evidence of petitioner's waiving the statute or filing a fraudulent return consisted, among other things, of his execution of Government's Exhibit 3 (R. 73), received over objection (R. 10), this being a Waiver of Restrictions on Assessments, Form 870, dated November 16, 1954, on which petitioner allegedly consented to the assessment and collection of the claimed deficiencies for 1944, and which had the words "50% Fraud" typed above the penalty column of the form (R. 73). This form contained a statement at the bottom that the signing of the Waiver did not extend the statutory period for making the assessment (R. 73).

The government also introduced over objection (R. 20), Government's Exhibit 17 (R. 80), a government form entitled "Offer in Compromise", signed by petitioner, offering to settle his alleged deficiency for the year 1944 for the amount of $1200.00 (R. 80). This offer was later withdrawn, the withdrawals accepted (R. 30), and the $1200.00 accompanying the offer was credited to the petitioner's I. R. S. account (G. Ex. 1, R. 71). The latter was done pursuant to an authorization by petitioner upon the rejection of the compromise offer (R. 5b, Resp. Appendix).

Based on petitioner's execution of the Waiver form, the Offer in Compromise form and upon petitioner's authorizing Internal Revenue to apply the $1200.00 to his I. R. S. account, the Certificate of Assessments for 1944, Government's Exhibit 1 (R. 71), was admitted in evidence over objection (R. 10). The Court of Appeals held that such evidence was sufficient to permit the otherwise late assessment for 1944 (Appendix B).

At the trial, the government, over petitioner's additional objections, offered the Certificates of Assessments and Payments, Government Exhibits 1 and 2, for all three years involved and they were admitted in evidence against petitioner (R. 10, 71, 72), showing $27,032.00 in back taxes

due for the three years as well as interest and penalties totalling almost $30,000.00 more for the 3 years (R. 71, 72). Petitioner contended in the District Court and in the Court of Appeals that the introduction of these Assessment sheets, including amounts far in excess of the alleged liability charged in the indictment prejudiced his case before the jury, but his motion for a mistrial was denied (R. 11), in the district Court and the Court of Appeals held that permitting the jury to see the interest and penalty amounts on the Assessment Sheets did not prejudice petitioner (Appendix B).

REASONS FOR GRANTING THE WRIT.

I.

The decision of the Court below in the instant case that there was evidence of fraud in the 1944 return, allowing an assessment at any time, based on petitioner's signing the Government Waiver form (G. Ex. 3, R. 73) and executing an Offer in Compromise form (G. Ex. 17, R. 80) as well as authorizing the compromise offer to be applied to his alleged liability after the offer was withdrawn (R. 5b) is in conflict, so far as the Waiver is concerned, with the opinion of the 8th Circuit Court of Appeals in **Clark v. United States** (C. A. 8, 1954), 211 F. 2d 100, l. c. 105 (Appendix C).

The court in the **Clark** case stated that the execution of a Waiver, Form 870, was not entitled to any effect to convict a taxpayer on a criminal charge of evasion. While the Court did not reverse Clark's conviction because it was a non-jury trial and the District Judge attached no weight to the waivers as indicated in his findings of fact, in a jury case the conclusion is inescapable that this Waiver would not have been admitted, as it was here, over objection (R. 10), for any purpose, including the elimination of the Statute of Limitations.

If the Clark decision is correct, as we think it was, the court below in this case was wrong when it stated in its opinion that

> "The jury could properly have considered the signing of the waiver, consenting to an assessment of an increased tax and a fraud penalty, together with defendant's later conduct, as an admission of fraud in the 1944 return as well as of liability."

Settlement of the question by this court is plainly in the public interest, since the execution of a Form 870 Waiver is common practice in both civil and criminal tax investigations and whether it can thereafter be introduced in evidence in a criminal tax evasion trial should be finally determined.

The court below also held that the Offer in Compromise (G. Ex. 17, R. 80) signed by petitioner on Treasury Department Form 656, offering to settle the alleged 1944 liability for $1200.00 was additional evidence of the filing of a fraudulent return for that year (Appendix B). The form stated that the alleged violation was due to "Filing a fraudulent return for the year 1944." This and petitioner's authorization to I. R. S. to apply the tendered funds ($1200.00) to his tax liability, after the offer of Compromise was withdrawn (R. 5b) and the withdrawal accepted, constituted evidence of fraud to permit the late 1944 assessment to be received in evidence (R. 71, 10) according to the court below.

The opinion in **Ecklund v. United States** (C. A. 6, 1947), 159 F. 2d 81, conflicts with the holding of the Court of Appeals below that the Offer of Compromise was admissible for that purpose. This case seems to have established that in criminal cases offers of compromise or settlement, such as England, Sr.'s offer to compromise his 1944 tax liability, are inadmissible and of no evidentiary value.

Petitioner's offer in compromise (R. 80) and the assessment sheet for 1944 (R. 71) were received over petitioner's objection (R. 10, 20) and the Court of Appeals decision held that this was proper (Appendix B).

Since the Offer in Compromise form is so often used in tax negotiations and the court below has held, contrary to the **Ecklund** decision, that settlement offers are admissible in evidence, it would be in the public interest for this court to decide the question.

The Court of Appeals decision further held that it was evidence of the filing of a fraudulent return for 1944 that petitioner authorized Internal Revenue Service to apply the tendered funds to his tax liability when the compromise fell through (Appendix B). Since this authorization was all part of the compromise procedure and indeed the compromise form itself permitted the Government to retain the amount offered (R. 80), petitioner's conduct was beyond his control and a part of the settlement activity which the **Ecklund** case held inadmissible, contrary to the holding of the court below.

Inasmuch as the execution of these government forms by petitioner and his conduct in authorizing the retention of his settlement offer formed the sole basis for the finding that the 1944 returns were fraudulent and that therefore the Statute of Limitations did not apply to the 1944 assessment, there was no admissible evidence of a fraudulent return for that year and the Limitations Statute, 26 U. S. C. 6501, should have prevented the introduction of the 1944 Certificate of Assessments (G. Ex. 1, R. 71) when petitioner objected (R. 10).

Settlement of the questions above on the introduction of these widely used Revenue Service forms as evidence of fraud, particularly in view of the wording on Waiver Form 870 that its execution does not extend the statutory

period of limitation for assessment, is plainly in the public interest, since it is likely to come up in tax evasion cases wherever assessments are attempted long after the returns have been filed or where offers in compromise have been made.

II.

The opinion of the Court below infers that even if the evidence of tax liability for the year 1944 should have been excluded for lack of evidence that the 1944 return was fraudulent, it would make no difference because there was evidence of substantial tax liabilities for 1945 and 1946 (Appendix B).

Admitting that there was evidence of substantial taxes owed by petitioner in 1945 and 1946, if the 1944 taxes were outlawed by the Statute of Limitations (See Point I) the introduction of the Certificate of Assessments for that year, over objection (R. 10) clearly prejudiced the petitioner, according to the decision in **Flemister v. United States** (CA 5, 1958), 260 F. 2d l. c. 514, 518 (Appendix C). The language in the Flemister case seems directly to conflict with the language of the Court below in its opinion.

As a matter of fact in the Flemister case the Court held that submitting evidence of taxes due for a year barred by the Statute of Limitations was erroneous and prejudicial to the defendant on all counts even when that year formed the basis of a separate count in the indictment and the tainted evidence might be claimed to affect that count alone. In the instant case, where the 1944 tax charges were lumped in the same count as the charges for 1945 and 1946 it was clearly prejudicial. The decision of the Court below is believed to be erroneous and the conflicting decision of the Fifth Circuit Court of Appeals in **Flemister v. United States**, supra, to be correct.

III.

The decision of the Court below is believed to be erroneous on a question raised for the first time in this case. In order to show the amount of taxes owed by petitioner the Government introduced over objection (R. 10) the Certificates of Assessments and Payments (G. Exs. 1 and 2, R. 71, 72) along which Waiver Forms and Offers in Compromise discussed above, which showed $27,032 in taxes owed for 1944, 1945 and 1946 (the amount charged in the Indictment), and also showed a total of $29,268.39 in interest and penalties due for the three years.

Petitioner's motion for a Mistrial for permitting the jury to see these amounts claimed to be due in addition to the amount charged in the Indictment (Appendix A) was overruled (R. 11). The Court below held such disclosures not prejudicial (Appendix B).

The effect was that the jury received evidence that the petitioner owed far more to the government than the indictment charged and there was apparently no reason why the amounts of interest and penalties could not have been blocked out or masked on all of these exhibits. This is often done and the items were listed separately on the Assessment sheets (G. Exs. 1 and 2, R. 71, 72).

It should be noted in connection with this point that the exhibits referred to indicate that in the same period that England was charged in the indictment with evading payment of taxes totaling $27,032.00, he had paid to Internal Revenue Service or it had seized from him well over that amount (G. Exs. 1 and 2, R. 71, 72) chargeable first against tax deficiencies and then to interest and penalties (R. 18, 19). This was of course, less than the $56,300.37 owed according to the exhibits, interest and penalties making the difference. The payments were credited to the taxes (R. 18, 19) leaving only interest and penalties allegedly due.

Since petitioner was not charged with evading payment of interest and penalties the introduction of Exhibits showing these items was highly prejudicial to his defense and it is believed that the Court of Appeals opinion upholding this action by the District Court is of sufficient importance in this type of case to warrant the consideration of this Court in a hearing on the merits.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE T. WILLIAMS,
Counsel for Petitioner,

WAYNE H. BIGLER, JR.,
Associate Counsel for Petitioner.

August 2, 1967.

APPENDIX

APPENDIX A.

Indictment.

In the District Court of the United States of America
for the Eastern District of Illinois.

United States of America, Plaintiff, vs. William B. England, aka William Benjamin England, Defendant.	Criminal No. 19548. Title 26, United States Code, Section 7201, and Title 18, United States Code, Section 2.

(Nov. 27, 1962.)

The Grand Jury Charges That:

Count I.

Commencing in or about the 27th day of June, 1955, and continuing to the date of the return of this indictment, in the Eastern District of Illinois, William B. England, aka William Benjamin England, late of East St. Louis, Illinois, and William Bernard England, aka William B. England, Jr., late of East St. Louis, Illinois, did wilfully and knowingly attempt to evade and defeat the payment of income taxes, then due and owing by the said William B. England and Mary England to the United States of America for the year 1944, in the amount of $9,849.78, more or less, and by William B. England for the years 1945 and 1946, in the amount of $17,182.19, more or less, duly assessed against the said William B. England and Mary England on February 4, 1955, the said William B. England then having and owning real property subject to levy by the United States of America for the collection of such taxes, by con-

cealing and attempting to conceal from the Director of Internal Revenue the nature and extent of real property owned by said William B. England and the location thereof, and by wilfully and knowingly making false statements as to the ownership and interest in certain real property owned by the said William B. England, and located at 1118-1120 North Ninth Street, and at 803-805 Exchange Avenue, in the City of East St. Louis, Illinois, in violation of Title 26, United States Code, Section 7201, and Title 18, United States Code, Section 2.

A True Bill.

(Signed) Luther H. Beggs,
Foreman.

(Signed) Carl W. Feickert,
United States Attorney.

APPENDIX B.

Opinion of Court Below.

In the United States Court of Appeals
for the Seventh Circuit.

September Term, 1967-April Session, 1967.

No. 15885,

United States of America,
Plaintiff-Appellee,
v.
William B. England, a/k/a,
William Benjamin England,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Illinois.

April 13, 1967.

Before Schnackenberg, Fairchild and Cummings, Circuit Judges.

Fairchild, Circuit Judge. This case has been here before. Many of the facts are reflected in the earlier opinion[1] and need not be repeated.

England, Sr. and England, Jr. were charged with wilfully attempting to evade and defeat the payment of income taxes owed by England, Sr. for 1944, 1945 and 1946 by concealing and misrepresenting England, Sr.'s ownership of certain real estate. The first trial resulted in

[1] United States v. England (7th Cir. 1965), 347 F. 2d 425.

conviction of both. This court reversed because of an erroneous instruction. On the second trial, England, Jr. was acquitted and England, Sr. convicted. England, Sr. has appealed, raising three points.

1. **Proof of liability for 1944 tax.** The government's theory is that England, Sr.'s liability for 1944, 1945 and 1946, the payment of which he attempted to evade, was determined by assessments made February 4, 1955. That date was more than three years after the filing of the returns for the years in question. But the lapse of three years is immaterial if the returns were false or fraudulent, with intent to evade the tax.[2] England, Sr. concedes there was evidence, sufficient to go to the jury, that the 1945 and 1946 returns were fraudulent, but asserts there was no evidence that the 1944 return was fraudulent, and argues that the assessment for that year should not have been admitted in evidence.

The government points out that it makes no difference whether the jury found there was liability for 1944 or not, because there were substantial liabilities for the other two years, payment of which England, Sr. attempted to evade.

In addition the government contends there was sufficient evidence for the jury to find that the 1944 return was fraudulent and the 1955 assessment therefore timely. We agree. England, Sr. signed a waiver and consent, set out in a footnote in the prior opinion, p. 428. He consented to assessment and collection of an amount of tax for 1944, as well as an additional amount labeled "50% Fraud Penalty." He did not challenge the assessment during seven years after it was made, but recognized the liability. He made an offer of compromise in which he asserted inability to pay as the only ground for acceptance, and after

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[2] 26 U. S. C. A., § 6501 (c) (1).

rejection of the offer, he authorized the Internal Revenue Service to apply the tendered funds to his tax liability.

It is true that the waiver recited that it did not extend the statutory period of limitation for assessment, but if the 1944 return was fraudulent, there was no applicable period of limitation to be extended. The jury could properly have considered the signing of the waiver, consenting to an assessment of an increased tax and a fraud penalty, together with defendant's later conduct, as an admission of fraud in the 1944 return as well as of liability.

2. **Evidence of penalties and interest.** The indictment charged attempts to evade payment of 1944 tax in the amount of $9,849.78 and of 1945 and 1946 tax in the amount of $17,182.19. In the course of trial several documents were received which showed the amount of penalties and interest as well as the tax. England, Sr., does not challenge the propriety of admitting the documents to show the tax figures. His concern is over the effect the total amount of liability, some $56,000, may have had on the jury.

Accrual of substantial amounts of penalty and interest is a consequence of the existence of tax liability under the circumstances of the case, and we do not view the incidental disclosure of these amounts to the jury as prejudicial for any reason.

3. **Instruction on acts of co-defendant.** The court included in its instructions, the following:

> "But when men enter into an agreement, either formal or implied, for an unlawful end they become agents for one another. What one does pursuant to the common purpose, all do, and acts, declarations, of the common design and during its continuance are competent and admissible against all.

"If you now find beyond a reasonable doubt from all the evidence in this case that there was a common plan or design of the two defendants to engage in a course of conduct of the type shown by the evidence, you may consider all the acts, declarations and statements of each of the individual defendants as evidence pertaining to both.

"On the other hand, if you find from all the evidence that such a common plan or design was not shown beyond a reasonable doubt, then you will consider the acts and declarations of each defendant only as to him and not to the other defendant."[3]

The court refused to instruct, as requested by defendants:

"... An admission or incriminatory statement made outside of Court by one defendant may not be considered as evidence against another defendant not present when the statement was made."

Obviously the requested instruction would have to be modified in order to be a correct statement with respect to declarations in furtherance of a common design, during its continuance. Further, the last paragraph quoted from the instruction given covers the subject. Actually, it was more favorable to defendants than their request, for it would not have informed the jury that the statement of one in the presence of the other may be considered against both, even where there is no common design. Finally, the jury acquitted England, Jr., and thus found there was no common design. It must then be assumed that the jury did not consider against England, Sr., two documents which were prepared by England, Jr. These are the items of evidence which appear to give England, Sr., concern.

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[3] See the closely similar instruction quoted in United States v. Bernard (7th Cir. 1961), 287 F. 2d 715, 720, cert. den. 366 U. S. 961 (1961).

Refusal to give the instruction was not prejudicial error.

The judgment appealed from is Affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Judgment.

United States Court of Appeals for the Seventh Circuit, Chicago, Illinois 60604.

Thursday, April 13, 1967.

Before

Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Thomas E. Fairchild, Circuit Judge,
Hon. Walter J. Cummings, Jr., Circuit Judge.

United States of America, Plaintiff-Appellee, No. 15885, v. William B. England, a/k/a William Benjamin England, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Illinois.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby Affirmed, in accordance with the opinion of this Court filed this day.

APPENDIX C.

Conflicting Opinions.

1. Clark v. United States, 211 F. 2d 100.

Clark v. United States.
No. 14652.
United States Court of Appeals,
Eighth Circuit.
March 19, 1954.
Rehearing Denied April 12, 1954.

Defendant was convicted of attempted income tax evasion. The United States District Court for the Eastern District of Missouri, George H. Moore, J., rendered judgment and defendant appealed. The Court of Appeals, Johnsen, Circuit Judge, held that evidence was sufficient to support conviction.

Judgment affirmed.

1. Internal Revenue, Key 1288.

Gross income, and not gross receipts, is the foundation of income tax liability, but gross receipts with non-income items excluded may reflect a taxpayer's gross income. 26 U. S. C. A., § 22.

2. Internal Revenue, Key 2448.

The government is not required, in prosecution for attempted evasion of income tax, to establish attempted income tax evasion by the same processes and formalities which taxpayer is required to observe in making his return, and can demonstrate existence of unreported income by any practical method of proof available in the circumstances of the particular situation. 26 U. S. C. A., §§ 22, 145 (b).

3. Internal Revenue, Key 2447.

Government, in prosecution for attempted evasion of income taxes, was not required to establish exact amount of unreported income. 26 U. S. C. A., §§ 22, 145 (b).

4. Internal Revenue, Key 2447.

In prosecution for attempted evasion of income taxes, government is not required, as part of its prima facie case, to prove non-existence of other deductions from gross income than those shown on taxpayer's return. 26 U. S. C. A., §§ 22, 145 (b).

5. Internal Revenue, Key 2458.

Where, in prosecution for attempted evasion of income taxes, the unreported income pointed to by government's evidence is reasonably capable of being found to have exceeded the amount of unclaimed deductions, fact that taxpayer establishes that unclaimed deductions exist does not as a matter of law, destroy government's prima facie case; and attempt to establish unclaimed deductions as defense against fraud in misstating income ordinarily presents merely question of fact as to existence of such deduction and may reveal intent by taxpayer to conceal unreported income by partially neutralizing face of his returns. 26 U. S. C. A., §§ 22, 145 (b).

6. Internal Revenue, Key 2408.

Where taxpayer, who was prosecuted for attempted income tax evasion, had included in reported business expenses certain outlays on behalf of customers, government, in determining taxpayer's adjusted gross income, could recognize such outlays as business expenses and include reimbursement for such outlays in computing gross income, even though such transactions would not ordinarily be treated as business income and expense. 26 U. S. C. A., §§ 22, 145 (b).

7. Internal Revenue, Key 2451.

In prosecution for attempted income tax evasion, taxpayer's evidence did not establish omitted proper deductions so exceeding unreported income as to legally destroy government's prima facie case of existence of unreported taxable income and of willfulness in connection therewith. 26 U. S. C. A., §§ 22, 145 (b).

8. Internal Revenue, Key 2408.

Determination of willful intent to evade income taxes could be made upon consideration of taxpayer's conduct in failing to supply records to accountant who prepared returns, in failing to demonstrate basis for reported figures, in withholding business records and knowledge of bank accounts from government investigators, in living in manner beyond reported means, and from taxpayer's appearance on stand. 26 U. S. C. A., §§ 22, 145 (b).

9. Internal Revenue, Key 2451.

In prosecution for attempted evasion of income taxes, evidence was sufficient to support finding that taxpayer's understatement of income was willful. 26 U. S. C. A., §§ 22, 145 (b).

10. Criminal Law, Key 1158 (4).

Question of sufficiency of foundation for admissibility of exhibits was for trial court. 26 U. S. C. A., §§ 22, 145 (b).

11, Criminal Law, Key 409.

In prosecution for attempted evasion of income taxes, evidence was sufficient to identify statements of gross receipts which taxpayer filed with city licensing offices as authentic admissions by taxpayer, admissible in evidence. 26 U. S. C. A., §§ 22, 145 (b).

12. Criminal Law, Key 338 (1).

In prosecution for attempted evasion of income taxes by taxpayer who reported on cash basis, evidence that, had taxpayer reported on accrual basis, amount of unreported income would have been smaller, was incompetent as a hypothesis of fact which had no probative basis. 26 U. S. C. A., §§ 22, 145 (b).

13. Internal Revenue, Key 2408.

The signing of a waiver of restrictions on assessment and collection of deficiency in income tax does not preclude a taxpayer from maintaining a civil suit for refund of taxes assessed and can have no effect to convict the taxpayer on a criminal charge of evasion. 26 U. S. C. A., §§ 145 (b), 272 (d).

14. Criminal Law, Key 406 (1).

In prosecution for attempted evasion of income taxes, waiver of restrictions on assessment and collection of deficiency in tax, which had been signed by taxpayer, was inadmissible. 26 U. S. C. A., §§ 145 (b), 272 (d).

15. Criminal Law, Key 1186 (4).

Where evidence, in prosecution for attempted income tax evasion, tried to court without jury, was overwhelmingly convincing of taxpayer's guilt, and where it did not appear that trial court considered waivers of restrictions on assessment and collection of deficiency, which had been signed by taxpayer, in reaching his decision, improper admission of such waiver was not reversible error. 26 U. S. C. A., §§ 145 (b), 272 (d); Fed. Rules Crim. Proc. rule 52 (a), 18 U. S. C. A.

Don O. Russell, St. Louis, Mo., for appellant.

H. Brian Holland, Asst. Atty. Gen., Meyer Rothwacks and Joseph M. Howard, Sp. Assts. to Atty. Gen., Harry Richards, U. S. Atty., St. Louis, Mo., and William J. Costello, Asst. U. S. Atty., Washington, D. C., for appellee.

Before Johnsen and Collet, Circuit Judges, and Nordbye, District Judge.

Johnsen, Circuit Judge.

Appellant, an undertaker in St. Louis, Missouri, was convicted of attempted income tax evasion, 26 U. S. C. A., § 145 (b), for the years 1945 to 1949 inclusive, through the filing of false and fraudulent returns. The trial was to the court, without a jury.

The indictment alleged that he had knowingly misstated his net income for 1945, as being $3,437.92, whereas it was $46,808.98; for 1946, as being $5,423.24, whereas it was $30,267.19; for 1947, as being $6,998.34, whereas it was $12,822.31; for 1948, as being $6,178.14, whereas it was $23,239.96; and for 1949, as being $9,381.67, whereas it was $25,236.69. The amount of the tax which he had paid and the amount which it was claimed that he should have paid were also set out for each year. All of appellant's income was admittedly derived from his funeral business.

Each count of the indictment further undertook to show, equivalently as a bill of particulars, how the Government had arrived at its determination of net income for the year. The method employed was the same for all of the years. The computation first took the "Gross Receipts" of the business. From this was subtracted the "Cost of Goods Sold," that is, the merchandise purchased for sale. Next was subtracted "Other Business Deductions," consisting of salaries, interest, taxes, depreciation, rent, and all the other items which appellant had claimed as busi-

ness expenditures in his returns. The amount remaining was treated as appellant's "Adjusted Gross Income." From this, subtraction was made of the amount of the standard deduction for non-business expenses, which the Internal Revenue Code allowed, and which appellant had used in his returns, to arrive at appellant's "Net Income."

Appellant's principal contention here is that the trial court erred in overruling his motion for acquittal, because the Government's method of computation did not legally establish that any understatement of income had been made in his returns. The gist of his argument is that the Government had improperly taken appellant's Gross Receipts as the foundation of its computation; that Gross Receipts are not the basis of income tax liability, Southern Pacific Co. v. Lowe, 247 U. S. 330, 335, 38 S. Ct. 540, 62 L. Ed. 1142, because they may include return of capital as well as income; that here they had admittedly included reimbursements of "outlays" made by appellant on behalf of customers, for cemetery lots, clergyman's and organist's fees, extra limousines hired from outside sources, newspaper notices, etc., which were not part of the services covered by his general funeral prices; and that, in any event, while the Government claimed that all such returns of capital had been subtracted from the Gross Receipts in arriving at appellant's Adjusted Gross Income—appellant's returns having showed that he had included such "outlays" as operating expenses in his business deductions, and the Government having accepted all of the deductions so claimed by him, for purposes of its result of Adjusted Gross Income —the Revenue Agents had failed to engage in any audit to establish that appellant had in fact included all of such "outlay" expenditures in his business deductions, and that it therefore had not legally established that its computation of Adjusted Gross Income did not consist of returns of capital.

[1] This argument is without any legal substance on the realities of the situation. Of course, gross income and not gross receipts is the foundation of income tax liability, for it is only earnings, profits and gains which the statute subjects to tax. And manifestly, gross receipts can not be called gross income, insofar as they consist of borrowings of capital, returns of capital, or any of the other items which section 22 of the Internal Revenue Code, 26 U. S. C. A., § 22, has excluded from gross income. But when all of these things have duly been taken into account, no matter by what process it has been done, the amount remaining of Gross Receipts necessarily may, in its character as a result, properly reflect the taxpayer's Gross Income, which it is his duty to report.

On the Government's evidence, that is what the result of its computation amounted to in the present situation. The fact that the computation started with appellant's Gross Receipts would not prevent the result reached, no matter by what other term in accounting nomenclature it might be possible to designate it, from legally being reflective of appellant's Gross Income for purposes of proving income tax evasion by him.

[2-5] The Government is not required to establish income tax evasion by the same processes and formalities which a taxpayer is required to observe in making his return. The existence of unreported income may be demonstrated by any practical method of proof that is available on the circumstances of the particular situation. Cf. Burka v. Commissioner, 4 Cir., 179 F. 2d 483, 485. And it is not necessary, in order to make a case of tax evasion, that the exact amount of such income should be established. United States v. Johnson, 319 U. S. 503, 517, 63 S. Ct. 1233, 87 L. Ed. 1546. Nor is it incumbent upon the Government, in making a prima facie case of evasion to prove the non-existence of any other deductions than

those which the taxpayer has claimed in his return. United States v. Link, 3 Cir., 202 F. 2d 592, 593, 594. If the taxpayer legally has other deductions than those which he has so claimed, it is his privilege to show them and explain them as part of his defense.. Some times the failure to claim deductions in a return may well be a part of the taxpayer's scheme to cover up his unreported income as a matter of not creating suspicion on the face of his return. It does not therefore destroy the Government's prima facie case as a matter of law that the defendant is able to develop on cross-examination of the Government's witnesses that a right to other deductions may exist, or to establish by his own evidence that such deductions do in fact exist, and especially is this true where the unreported income pointed to by the Government's evidence is reasonably capable of being found to have exceeded the amount of the unclaimed deductions. In any event, the attempt to establish unclaimed deductions as a defense against fraud in misstating income will ordinarily of itself present merely a question of fact, first as to the existence and amount of such deductions, and further, as suggested above, as a possible ingredient in the taxpayer's intent to conceal his unreported income by partially neutralizing the face of his returns.

[6] What has been said is controlling of the present situation. The Government's computation, as has been indicated, did not use appellant's Gross Receipts as his Gross Income but simply took the Gross Receipts as the starting point of its method of arriving at his Adjusted Gross Income, in convenient approach and correlation to his manner of doing business, of keeping records, and of making his returns. The Revenue Agents subtracted the cost of all the merchandise which he had bought for sale, such as caskets, etc., and thus took account of any returns of capital from this source which were involved in his Gross Receipts. As to the "outlays" which appellant had

made for cemetery lots, clergyman's and organist's fees, extra limousines hired from outside sources, newspaper notices, etc., which were not covered by the general funeral price, appellant's tax returns showed that he had made deductions of such items as costs of operation or business expenses, without correspondingly, however, having treated the repayment of them by the customer as being equivalent on this basis to income resulting to him.

The Government chose, for purposes of its computation, to allow the "outlays" to stand as business expenses, and to treat the repayment of them as income, instead of eliminating them from the deductions claimed by appellant and from the Gross Receipts as technically constituting outlays and returns of capital, for the reason primarily that appellant admitted to the Revenue Agents during their investigation that on some of these items he had made a profit, in that he had received a "kick-back" or had collected more from the customer than the amount of his actual outlay, and further appellant was not able to produce any bills, check-stubs, or other record of his expenditures, except for 1949 and part of 1948, from which it would have been possible for the Revenue Agents to determine how much the "outlay" receipts had in fact exceeded the "outlay" expenditures.

[7] The result obtained by the Revenue Agents necessarily would be in the circumstances reflective of the amount of appellant's Adjusted Gross Income, assuming the correctness of the amount of the deductions allowed. And as we have said, the Government was entitled, for purposes of its prima facie case, to treat the amount of the deductions, with their inclusion of such "outlays", as being correct, if it chose to do so, because they had been so shown and declared in appellant's returns. Also, there was here no such establishment of omitted proper deductions, through cross-examination of the Government's witnesses or on the evidence of appellant, as legally destroyed

the Government's prima facie case of existence of unreported taxable income and of willfulness in connection therewith.

[8, 9] Appellant further argues, however, that the evidence was legally insufficient to establish that such understatement of income as may have occurred was willful. The evidence showed that appellant's returns purported to have been prepared by an accountant, but that the fact was that appellant did not give the accountant access to his records but merely submitted figures to him, for preparation of the returns, which appellant compiled himself; that, both during the investigation and on the trial, appellant had never been able to explain or demonstrate from his records or otherwise how he had gotten the receipts figures which he gave the accountant; that, while appellant maintained four books or records in the operation of his business (a funeral record book; a cash receipts book; a journal showing receipts from ambulance and limousine rentals and stillborn burials; and a loose-leaf book of receipts from hearse loans to other undertakers) he gave the Revenue Agents, when they began their investigation, in response to their request for his books and records, only his funeral record book, told them that he had no other record of his receipts, and declared that the book correctly and completely showed all the receipts of his business, which it did not; that similarly when the Revenue Agents inquired about his bank account, he gave them the name of only one bank, and failed to give them the names of three other banks, in which he had an account; that his standard of living indicated an expenditure of money far beyond the amount of the net income which he showed in his returns; and that he was throughout the investigation and on the witness stand evasive or equivocal in much of what he said. All of these items of evidence were clearly relevant and sufficient to warrant the jury in making an inference of will-

fulness. Cf. Spies v. United States, 317 U. S. 492, 499, 500, 63 S. Ct. 364, 87 L. Ed. 418.

It is next contended that the court erred in admitting in evidence Exhibit Nos. 18 and 19, which were conflicting statements of gross receipts purporting to have been filed by appellants with the Office of the License Collector of the City of St. Louis, Missouri, as a basis for obtaining his undertaker's license. The ordinances of the City of St. Louis required an undertaker to file a statement of the gross receipts of his business for the previous fiscal year, in order to obtain his annual license. Both exhibits constituted statements of purported gross receipts, typed on appellant's business stationery. Neither of them was signed, but the ordinance does not appear to so require. Exhibit 18 purported to show appellant's gross receipts for the fiscal year July 1, 1948 to June 30, 1949. Exhibit 19 purported to show appellant's gross receipts for the calendar year 1949. The monthly receipts shown in Exhibit 19 were identical with the figures which appellant had given his accountant as the basis for preparing his 1949 tax return. The receipts shown in Exhibit 18, however, were substantially larger and corresponded closely to those appearing in his cash receipts book.

[10, 11] The only argument that merits consideration in relation to the Exhibits is that no sufficient foundation was laid for their admission. The Government offered them as being admissions on the part of appellant. The sufficiency of the foundation on this basis, to establish their identification or authenticity as having been prepared by appellant, was a matter for the discretion of the trial court. Metropolitan Life Ins. Co. v. Armstrong, 8 Cir., 85 F. 2d 187, 194. And that discretion was not here abused.

The Exhibits were produced in court by the Assistant Chief Clerk in the License Collector's Office as part of the files of that Office. They did not bear any filing stamp,

but the witness testified that no stamping or other official indication of filing was made as to any such licensing statements. The Revenue Agents testified that they had obtained the Exhibits from the License Collector's Office during the course of their investigation and had later returned them, but that, while they were in their possession, they had shown them to appellant in an effort to have him explain the discrepancy between them and he had admitted that the statements had been prepared and submitted by him as a basis for obtaining his license. He was interrogated under oath by the Revenue Agents and the sworn statement which he gave was introduced in evidence. In it he had said, among other things, as to the Exhibits: "I do not know how I arrived at these figures. I do not know why they are different * * * I don't know why I did not get the same figure * * * I will be frank with you, just as frank as I can. I have no explanation for anything."

On all of this, there is no basis to argue that the Exhibits were not legally entitled to be received in evidence. The question was not as to the admissibility of their contents as official statements or records, as appellant argues, but simply as to the sufficiency of their identification or authenticity as being statements of appellant. The elements as to their official character were merely incidents in the identification of them as personal statements.

[12] The contention also is made that the court erred in sustaining the Government's objection to various exhibits prepared by expert accountants for appellant and to the testimony of such accountants in relation to the exhibits. The object and effect of this proffered evidence was to demonstrate that a return of appellant's income for each of the years on an accrual instead of a cash basis would not leave any such great amount of unreported income as the Government claimed. The court excluded the evidence

on the ground that, on the face of the returns, the testimony of appellant himself, and the other circumstances appearing in the situation, it was indisputably clear that appellant had been reporting his income on a cash basis and not on an accrual basis, and that any hypothesizing of facts which had no probative basis was therefore wholly irrelevant and incompetent as a defense to the charge. Plainly, on the record, the court's ruling was proper.

[13, 14] One other contention is entitled to notice and mention. It is argued that it was error for the court to admit Exhibits Nos. 6 and 7, which consisted of two "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax" forms (Form 870, U. S. Treasury Department) which appellant had executed and given the Revenue Agents during the course of their investigation, in accordance with section 272 (d) of the Internal Revenue Code, 26 U. S. C. A., § 272 (d). The signing of such a waiver by a taxpayer is without any effect to preclude him from maintaining a civil suit for refund of the taxes assessed by the Commissioner on the basis of it. Payson v. Commissioner, 2 Cir., 166 F. 2d 1008, 1009; Herber v. Jones, (D. C. W. D. Okl.), 103 F. Supp. 210, 214, affirmed, 10 Cir., 198 F. 2d 544. Much less then is such a waiver entitled to have any effect to convict a taxpayer on a criminal charge of evasion. See also Annotation, 11 A. L. R. 2d pages 903, 907, 912, 915.

[15] The Exhibits therefore should not have been received in evidence as having legal probative quality. But appellant is not entitled to a reversal for this error. The case is not one that was tried to a jury. The evidence is overwhelmingly convincing of appellant's guilt to anyone reading the record. The court did not refer to the waivers in its detailed findings of fact. And there is nothing else in the proceedings to suggest that the court in any way

relied upon or attached weight to the waivers as a factor in its convicting of appellant. On these circumstances, we do not think that it can reasonably be said that any substantial right of appellant has been affected as a matter of either process or result. Rule 52 (a), Federal Rules of Criminal Procedure, 18 U. S. C. A.

Affirmed.

2. **Ecklund v. United States**, 159 F. 2d 81.

Ecklund v. United States.
No. 10222.
Circuit Court of Appeals, Sixth Circuit.
Jan. 20, 1947.

Criminal Law, Key 408.

In prosecution against dealer for selling through his salesman an automobile above ceiling price, admission of evidence that dealer settled buyers' civil claim was error since evidence of settlement was not evidentiary of attempt to stifle criminal prosecution inasmuch as civil remedies and criminal sanctions are provided in Emergency Price Control Act for violation of price regulations and wilful violation is essential only to criminal prosecution. Emergency Price Control Act of 1942, §§ 2 (a), 4 (a), 205 (b, e), 302 (h), as amended, 50 U. S. C. A. Appendix, §§ 902 (a), 904 (a), 925 (b, e), 942 (h); Stabilization Act of 1942, § 1 et seq., 50 U. S. C. A. Appendix, § 961 et seq.; Executive Orders 9250, 9328, 50 U. S. C. A. Appendix, § 901 note.

Appeal from the District Court of the United States for the Eastern District of Michigan; Ernest A. O'Brien, Judge.

Reginald A. Ecklund was convicted of selling an automobile above the lawful maximum ceiling price provided by OPA regulations, and he appeals.

Reversed and remanded.

Ralph Helper, of Detroit, Mich. (George C. Parzen and Harold Helper, both of Detroit, Mich., on the brief), for appellant.

Joseph C. Murphy, of Detroit, Mich. (John C. Lehr and Joseph C. Murphy, both of Detroit, Mich., on the brief), for appellee.

Before Simons, Martin, and Miller, Circuit Judges.

Martin, Circuit Judge.

The jury returned a verdict of guilty against the appellant, Reginald A. Ecklund, on an information charging him and E. B. Eldridge with unlawfully, wilfully and knowingly selling a 1942 Chevrolet sedan above the lawful maximum ceiling price provided by O. P. A. Regulations promulgated in pursuance of Acts of Congress.[1] Appellant was fined $500 and sentenced to eight months' imprisonment.

At the time of Ecklund's trial, the co-defendant, E. B. Eldridge, was a fugitive from justice. Though the informa-

[1] The information specifically charged wilful violation of Sec. 2, Maximum Price Regulation 540, as amended, issued June 10, 1944, effective July 10, 1944, 9 F. R. 6434, by the Price Administrator of the Office of Price Administration, pursuant to the authority of Sec. 2 (a) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 57 Stat. 566, Pub. Law 383, 78th Congress, Public Law 108; 79th Congress, 50 U. S. C. A. Appendix, § 902 (a); 56 Stat. 765, 50 U. S. C. A. Appendix, § 961 et seq.; Executive Order 9250, 50 U. S. C. A. Appendix, § 901 note, 7 F. R. 7871, Executive Order 9328, 50 U. S. C. A. Appendix, § 901 note, 8 F. R. 4681); as amended by Appendix B amended by Am. 1, 9 F. R. 7871, Am. 2, 9 F. R. 10872, Am. 3, 9 F. R. 12679, Am. 5, 10 F. R. 1383, Am. 6, 10 F. R. 1911, and Am. 10, 10 F. R. 1383.

tion charged that Ecklund and Eldridge were doing business as Eck Motor Sales, appellant testified, without contradiction, that, on September 12, 1945, when the transaction in controversy occurred, he and his wife constituted a partnership under that firm name and that Eldridge was merely employed by them as a salesman on a commission basis.

It is apparent from the record that the conviction of Ecklund rested almost exclusively on the testimony of Mrs. Blanche Nitek. The testimony of her husband, Walter Nitek, was barely corroborative upon the essential issue of whether Ecklund had guilty knowledge that his salesman, Eldridge, was selling the automobile above the lawful ceiling price.

It appears that, around six or half-past six o'clock in the evening of September 12, 1945, Mrs. Nitek and her husband went to the used-car lot of the Eck Motor Sales to buy a used car. They talked with the salesman, Eldridge, who showed them around the lot. He took them for a ride in both a Dodge and a Chevrolet. Without discussion of ceiling prices, they were informed by him that the price of the Chevrolet would be $1495, and they agreed to purchase it.

Not having the necessary cash in hand, they were driven to their home by Eldridge in order to pick up their bank book. They returned to the lot and entered the office of Eck Motor Sales. Eldridge "proceeded to draw up the papers for the transaction," according to Mrs. Nitek. She testified that Ecklund was sitting at his desk nearby; that Eldridge prepared the papers, showing a price of $1495, plus tax, making a total of $1532; and that Eldridge asked if they wished to save eleven dollars. On receiving an affirmative answer, he tore up the papers and threw them into a wastepaper basket.

She testified that, under instruction of appellant, the salesman, Eldridge, told them to draw two checks, one to Eck Motor Sales for $1232.85 and another to Eldridge for $300; and that, also under instruction of appellant, Eldridge "made up another paper then using the selling price of the car at twelve hundred and some odd dollars." Payment was effectuated by two withdrawals on their bank book as evidenced by Cashier's checks: one for $1232.85, payable to Eck Motor Sales and so endorsed for deposit; the other for $300, payable to E. B. Eldridge and endorsed by him alone.

On cross-examination, the witness admitted that Eldridge "was the only one we talked to about the amount that we were going to pay," and that they had no direct conversation with appellant Ecklund. She remained steadfast in her testimony that Ecklund told Eldridge to draw one check for $1232.85 [the legitimate ceiling price] payable to Eck Motor Sales, and the other for $300 payable to Eldridge. She stated that Eldridge made out the certificate of transfer of used passenger cars on the O. P. A. printed form, giving the actual sales price for the vehicle, including taxes, as $1232.85. She did not recall that Ecklund even saw that document.

Nitek testified that Eldridge and Ecklund were present in the sales office on the lot when the deal was closed; that Eldridge drew up some papers which Nitek and his wife signed; that Ecklund and Eldridge discussed making out two different orders—one for $300 and one for "about 1200 or so"—but that he could not recall whether Eldridge told Ecklund what he proposed to do or whether Ecklund suggested to Eldridge the method used. "Both were talking," and the witness did not pay much attention to them. He admitted that he gave no money to Ecklund; that Ecklund never said anything whatever to him about the price of the automobile; and that he "never saw him except on the evening of September 12, 1945, until

sometime later." Asked whether he meant by his testimony that Eldridge told Ecklund at what price the car was being sold, he answered: "Why, yes, I guess he must have." Pressed by leading questions to state that Ecklund directed the drawing of separate checks, as above described, he answered confusedly: "Well, no, I mean—well, I mean that they were directing the deal there, but—but—well, of course, at that time I did not pay much attention." On recross-examination, moreover, he again stated that he did not pay much attention to the conversation between Eldridge and Ecklund; that he meant that they were just talking about the deal. On the whole, his testimony was vague and uncertain.

Testifying in his own behalf, Ecklund stated that, on the evening of September 12, 1945, he was in his office only about ten minutes, for the reason that he had to pick up a reservation on a plane to Buffalo that night on a last-minute call requiring him to rush out to the airport. During the ten minutes in his office, he had very little conversation with the Niteks and did not talk to them about an automobile, being in a hurry to get to the airport; that "nothing was said with reference to more than one check being made out for the purchase of this automobile"; that he did not know how much money the Niteks were to pay for the car; that he instructed his salesmen to sell at the ceiling price; that he was not interested in the particular sale, because Eldridge was "capable of handling his own deals"; and that the Niteks were supposed to pay $1232.85, including tax and title transfers. His conversation with Eldridge, so he said, was to suggest that, inasmuch as the Niteks did not have the cash with which to buy the automobile, they should arrange with Eldridge to get their money from the bank and pay for the automobile next day. He emphatically denied that he had authorized Eldridge to have a check for any part of the purchase price made payable to himself. He declared that his firm

received $1232.85 for the Chevrolet automobile; that he never at any time received any additional money for it, or authorized anyone to sell the machine for more than $1232.85, the lawful ceiling price; that he did not know that Eldridge got a check for $300; that neither Eldridge nor anyone else ever told him about it until the Niteks later informed him, when he accompanied them to their attorney's office, that they had paid Eldridge $300 over the ceiling price.

The appellant was corroborated by his Sales' Manager, James A. Gudgel, who, incidentally, signed the aforementioned certificate of transfer as authorized agent of the Eck Motor Sales. He testified that when Eldridge asked Ecklund if it would be all right to deliver the car to the Niteks that night, Ecklund asked: "What are you selling the car for?" Eldridge then handed Ecklund a bill of sale form, which the latter examined and said, "Sure." Ecklund then suggested that Eldridge meet the Niteks at noon of the following day, pick up Mr. Nitek, take him to the bank to get the money and then take him back to work. Mr. Nitek protested that the suggested arrangement was unsatisfactory, for the reason that he had to be at work and would not have time to eat his lunch and get back on the job. "So, if I remember correctly," the witness stated, "Mr. Eldridge took them home that night and they gave him the pass book." Next day, Eldridge brought him a check to Eck Motor Sales for $1232.85, which he deposited on September 14, 1945, Ecklund being out of the city. Eldridge did not tell Gudgel that he had received more than the ceiling price for the automobile. The witness sent a copy of the certificate of transfer and warranty to the local office of O. P. A. He and Ecklund were the only persons who had authority to make the warranty for the Eck Motor Sales on the O. P. A. form.

The foregoing narrative embraces the substance of all the relevant testimony pertaining to the sale of the automobile in question.

When the Niteks discovered, by investigation through the O. P. A., that they had paid an over-ceiling price for the Chevrolet car, they took up the matter with Eldridge, but not with the appellant, Ecklund. Several days later, they consulted an attorney, who advised them to see Ecklund before instituting suit, as he "might want to settle out of court."

Asked by the Government attorney whether they subsequently instituted suit, Mrs. Nitek replied that, when they saw Ecklund, he said that he did not have time to talk to them and did not remember the deal. He told them to come to see him the next night, which they did. After unsuccessfully awaiting his appearance for some fifteen to twenty-five minutes, the Niteks became tired and left. Several days later, they went again to their lawyer.

The assistant district attorney asked: "Did you subsequently make a settlement with Mr. Ecklund?" The attorney for the defendant objected to the question. Addressing the Government attorney, the trial judge asked: "What do you claim?"

"We claim that a settlement was made and was evidence," answered the Government's legal representative. "We submit that the action on the part of the defendant subsequent to that sale *was evidence of his knowledge and guilt in this matter.*" [Italics supplied.]

The court then asked defense counsel: "What is the objection?" The attorney answered: "The objection is that it has no bearing whatsoever on the issues involved in this case and that any testimony in that respect may tremendously prejudice his rights in this court. It has no bearing whatsoever."

The court ruled the question competent and permitted Mrs. Nitek to answer that she and her husband had made a settlement with Ecklund. It is insisted on appeal that the ruling of the district court was prejudicially erroneous and impels reversal and remand of the case for retrial. The question presents novelty.

No direct authority upon the exact issue has been adduced by either the attorneys for appellant or the attorneys for the United States. The reasoning on both sides is by analogy; but, of course, to different conclusions. The Government contends that the rule is well established that an offer to settle a criminal prosecution is admissible in evidence. See Collins v. State, 115 Wis. 596, 92 N. W. 266; Scranton v. Henson, 151 Iowa 221, 130 N. W. 1079; Christian v. United States, 5 Cir., 8 F. 2d 732, 733, and the state court authorities there cited.[2]

In the Christian case, supra, the circuit court of appeals said: "Although there are authorities to the contrary, we are of opinion that the rule which excludes offers of compromise in civil cases does not apply to criminal cases. The law encourages the settlement of civil suits, but the compounding of crime is against public policy."

In United States v. Picarelli, 2 Cir., 148 F. 2d 997, 998, also cited by the Government, the court, in affirming a conviction for unlawful possession of gasoline ration coupons stated: "On the way to the police station, Picarelli [the arrested defendant] pulled his car to the curb and said to the policeman, 'Listen, Officer, can't we talk this thing over?' No innocent explanation of this inquiry being vouchsafed, we think the effort to effect a settle-

[2] Huntley v. Snider, 1 Cir., 86 F. 2d 539, involving an appeal by a bankrupt from the denial of his discharge in bankruptcy, is not considered to be in point, although cited with emphasis by the Government.

ment may be regarded as evidencing consciousness of guilt. Christian v. United States, 5 Cir., 8 F. 2d 732, 733; 4 Wigmore, Evidence, 3rd Ed., p. 31. This, coupled with ownership of the car, justified sending the case to the jury."

But, even conceding the correctness of the rule declared in the cited cases, appellant insists that these authorities have no bearing here, for the reason that the settlement by Ecklund of a civil claim based upon the sale by his agent of an automobile at an over-ceiling price would not be evidentiary of an attempt to stifle a criminal prosecution, inasmuch as both civil remedies and criminal sanctions are provided in the Emergency Price Control Act of 1942[3] for violation of price regulations made pursuant thereto and wilful violation is essential to a criminal prosecution,[4] while the civil remedies prescribed are not limited to cases of wilful violations.[5]

This contention is sound. Evidence of a civil-liability settlement previously made by the defendant in a criminal case of this character would have no real probative value to the effect that he had wilfully violated laws and regulations governing sales' prices. The defendant, himself, explained, after evidence of his settlement of the civil case had been received over his objection, that he made the settlement with the Niteks on the advice of his attorney, because he "did not want any unfavorable publicity with reference to that lawsuit." There is no proof whatever that he attempted to avoid criminal liability by settling the civil claim made by the Niteks against him.

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[3] 50 U. S. C. A. Appendix, § 904 (a), 56 Stat. 28; 50 U. S. C. A. Appendix, § 942 (h), 56 Stat. 36; 50 U. S. C. A. Appendix, § 925 (b), 58 Stat. 640.

[4] 50 U. S. C. A. Appendix, § 925 (b).

[5] 50 U. S. C. A. Appendix, § 925 (e). DiMelia v. Bowles, 1 Cir., 148 F. 2d 725, 726; Talbert v. Sims, 4 Cir., 143 F. 2d 958; Bowles v. Lee's Ice Cream, App. D. C., 148 F. 2d 113.

It has long been recognized that evidence of an effort to compromise is inadmissible in a civil case. Home Insurance Co. v. Baltimore Warehouse Co., 93 U. S. 527, 548, 23 L. Ed. 868. Why, then, should evidence of the settlement of a civil case be received in a criminal prosecution where the essential ingredients of liability are wholly at variance, in that no proof of wilful violation is necessary to establish civil liability but is a conditio sine qua non to criminal liability?

The prosecuting attorney distinctly stated that the evidence offered to show that Ecklund had settled the civil action brought against him by the Niteks "was evidence of his knowledge and guilt" in the matter for which he was being criminally prosecuted. In receiving the evidence on the basis stated, the trial judge left the jury under the impression that the settlement by Ecklund of his civil liability *was* evidence of his criminal guilt. The erroneous admission of the prejudicial evidence in this manner could well have tipped the scales against Ecklund in the weighing by the jury of the closely balanced conflicting testimony.

Reversed and remanded for a new trial.

3. Flemister v. United States, 260 F. 2d 513.

James L. Flemister, Appellant,

v.

United States of America,
Appellee.

No. 16781.

United States Court of Appeals,
Fifth Circuit.

Oct. 31, 1958.

Defendant was convicted of income tax evasion, and from a judgment of the United States District Court for the Northern District of Georgia, William Boyd Sloan, J., defendant appealed. The Court of Appeals, Tuttle, Circuit Judge, held, inter alia, that where reference to records of clerk of district court disclosed no record of "proceedings before the Commissioner on preliminary examination" and disclosed nothing in nature of a filed complaint, and only document in the record was an affidavit signed by internal revenue special agent averring truth of facts which were subsequently made the basis of indictment for income tax evasion, and it nowhere appeared that such document was even "filed" in office of Commissioner, that a warrant or summons was issued or that notice of its existence was communicated to accused until after the indictment, such affidavit did not amount to the "institution" of a complaint before the Commissioner within six year period so as to allow tolling of limitation period and hence indictment returned on June 14, 1956 for income tax evasion which allegedly occurred in 1949 was barred by limitation, and that in view of errors which occurred justice required that the conviction should be reversed and case remanded for new trial.

Reversed and remanded.

1. Internal Revenue, Key 2447.

In prosecution for income tax evasion, government had burden of proving that prosecution had been instituted in time. 26 U. S. C. A. (I. R. C. 1954), § 6531.

2. Criminal Law, Key 157.

Where reference to records of clerk of district court disclosed no record of "proceedings before the Commissioner on preliminary examination" and disclosed nothing in nature of a filed complaint, and only document in the record was an affidavit signed by internal revenue special agent averring truth of facts which were subsequently made the basis of indictment for income tax evasion, and it nowhere appeared that such document was even "filed" in office of Commissioner, that a warrant or summons was issued, or that notice of its existence was communicated to accused until after the indictment, such affidavit did not amount to the "institution" of a complaint before the Commissioner within six year period so as to allow tolling of limitation period, and hence indictment returned on June 14, 1956 for income tax evasion which allegedly occurred in 1949 was barred by limitation. 26 U. S. C. A. (I. R. C. 1954), § 6531. Fed. Rules Crim. Proc. rule 5 (c), 18 U. S. C. A.

See publication Words and Phrases, for other judicial constructions and definitions of "Institution".

3. Internal Revenue, Key 2451.

Proof of repeated understatements of income, coupled with failure to keep adequate records when viewed in light of evidence disclosing omission of specific large items of income, and when viewed in light of fact that the taxpayer was a lawyer and considering the indefinite and vague testimony given by him on witness stand would be sufficient to support conviction for income tax evasion. 26 U. S. C. A. (I. R. C. 1954), § 6531.

4. Criminal Law, Key 1169 (1).

In prosecution for income tax evasion based on net worth and nondeductible expenditures method of proof, wherein the government used summaries and computations which purported to summarize testimony or documentary evidence produced in court and to translate such testimony into figures having tax significance, since the summary was intended to be a mathematically correct statement of what witnesses or documents had proved in the case, court could not say that inclusion of clearly improper items in computing the taxpayer's net worth was not prejudicial. 26 U. S. C. A. (I. R. C. 1954), § 6531.

5. Criminal Law, Key 432.

In prosecution for income tax evasion based on net worth and nondeductible expenditures method of proof, a summary of testimony or documentary evidence produced in court, to be admissible, need not give effect to contentions of accused, but if it purports to be a statement of all the evidence as to a certain account it cannot include only items against the interest of the accused, but it must be what it purports to be, either a summary of all sworn testimony or a summary of testimony of certain witnesses. 26 U. S. C. A. (I. R. C. 1954), § 6531.

6. Criminal Law, Key 432.

In prosecution for income tax evasion based on net worth and nondeductible expenditures method of proof, summaries which purported to summarize testimony or documentary evidence produced in court and to translate such testimony into figures having tax significance were improperly admitted where they did not show that they represented only the testimony of government witnesses and were not a summary of all the relevant testimony. 26 U. S. C. A. (I. R. C. 1954), § 6531.

7. Criminal Law, Key 1169 (1).

In prosecution for income tax evasion for three years, where by trial of limitation issue separately it should have been determined that one year was barred by statute of limitations, it might well have been prejudicial to defendant for jury to hear evidence of understatements of income and computations of underpayment of tax as to the barred year in addition to those which were properly before it. 26 U. S. C. A. (I. R. C. 1954), § 6531.

8. Criminal Law, Key 1186 (1).

In prosecution for income tax evasion wherein prosecution's case was based on the net worth and nondeductible expenditures method of proof, and it appeared that one count of indictment involving one of the three years was barred by limitation, that summaries were improperly admitted, and that other errors occurred, justice required that conviction should be reversed and the case remanded for new trial. 26 U. S. C. A. (I. R. C. 1954), § 6531.

James M. Roberts, William G. Grant, Atlanta, Ga., for appellant.

Eugene Emerson, Atty., Dept. of Justice, Tax Division, Washington, D. C., James W. Dorsey, U. S. Atty., Atlanta, Ga., John N. Stull, Acting Asst. Atty. Gen., Joseph M. Howard, Eugene Emerson, Attys., Dept. of Justice, Washington, D. C., Andrew F. Oehmann, Acting Asst. Atty. Gen., Joseph F. Goetten, Atty., Dept. of Justice, Washington, D. C., Charles K. Rice, John J. McGarvey, Asst. Attys. Gen., for appellee.

Before Hutcheson, Chief Judge, and Tuttle and Jones, Circuit Judges.

Tuttle, Circuit Judge.

This is an appeal from a conviction for wilfully and knowingly attempting to evade and defeat United States income taxes covering the years 1949, 1950 and 1951. The prosecution's case was based on the net worth and non-deductible expenditures method of proof.

The principal errors asserted by appellant are: (1) that the court erred in not granting appellant's motion for a judgment of acquittal on Count One of the indictment (the year 1949) upon the ground that it was barred by the statute of limitations; (2) the court erred in not granting a motion for judgment of acquittal on the ground that the verdict was not supported by substantial evidence; (3) that the court erred in denying appellant's motion for new trial based on newly discovered evidence; and (4) that the court erred in admitting in evidence and in permitting the jury to have with it during its deliberations summaries and computations prepared by the government agents which did not accurately reflect the evidence in the case.

The indictment was returned on June 14, 1956. The income tax return for the year 1949 was filed March 13, 1950. Asserting these facts, appellant filed a motion to dismiss this count of the indictment. This motion was overruled by the court. The case subsequently went to trial, at the conclusion of which appellant renewed his attack on Count One asking a directed verdict of acquittal on the ground that any offense therein charged had been barred by the six year statute of limitations. This motion was overruled by the trial court, and the court adhered to the ruling in denying appellant's motion for new trial. In the order of denial the court stated that the court took judicial notice "of the proceedings before the Commissioner on preliminary examination which have been transmitted to the Clerk of the District Court," the court having found as to such complaint as follows:

"Rule 5 (c) of the Federal Rules of Criminal Procedure [18 U. S. C. A.] have [sic] been construed to permit the District Court to take judicial notice of the proceedings before the Commissioner on preliminary examination which have been transmitted to the Clerk of the District Court. See White v. United States, 5 Cir., 216 F. 2d 1, 4."

[1] No evidence was introduced during the trial of the case or on the preliminary motion which would toll the statute of limitations under Section 26, U. S. C. A. (I. R. C. 1954), § 6531.[1] Therefore, as the record stood when the case was submitted to the jury, the government had made no showing of facts sufficient to take the case from under the statute. As to the burden of proof in such a case, see White v. United States, 5 Cir., 216 F. 2d 1. In his motion for reconsideration of the order overruling the motion for new trial appellant asserted that no preliminary examination or proceedings before the United States Commissioner had taken place and no "complaint had been instituted" within the contemplation of the statute.[2] Although appellant asked the court to inquire into the facts by issuing a rule nisi, the court declined to do so and overruled the motion. Reference to the records of the Clerk of the District Court, of

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[1] "* * * Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States."

[2] "As a basis for the contention that no preliminary examination or proceedings were before the United States Commissioner, the Defendant avers that on March 5, 1956 on a form entitled a complaint to a United States Commissioner, Dick D. Elliott, who designated himself as Special Agent for the Bureau of Internal Revenue, went before Honorable Ross Arnold, United States Commissioner for this Honorable Court in the Atlanta Division, and swore to a complaint. The said Dick D. Elliott then took the said complaint form, put it in his pocket and left the United States Commissioner, who did not retain said complaint; nor a copy and

which the trial court said it took judicial notice, discloses no record of "proceedings before the Commissioner on preliminary examination," and in fact discloses nothing in the nature of a filed complaint. The only document in the record is an affidavit signed by the Internal Revenue Special Agent averring the truth of the facts which were subsequently made the basis of the 1949 indictment. It nowhere appears that this document was even "filed" in the office of the Commissioner, that a warrant or summons was issued, or that notice of its existence was communicated to Flemister until after the indictment on June 14th.

[2] We think it clear that the mere signing of this affidavit did not amount to the "institution" of a complaint before the Commissioner within the six year period. We find no appellate court decision supporting this proposition, but we think the reasoning of the District Court in United States v. Rully, D. C. D. Conn., 143 F. Supp. 283, is persuasive. This reasoning and conclusion was followed by the District Court in United States v. Jurzykowski, D. C. N. D. N. Y., 159 F. Supp. 7, 9.

[3] We next deal with the contention that the verdict was not supported by substantial evidence. We think it clear that if all of the evidence which was admitted was legally admissible, this ground for appeal must fail. Proof of repeated understatements of income, coupled with the failure to keep adequate records when viewed in light of the evidence disclosing omission of specific large items of income, and when viewed in light of the fact that appellant was a lawyer and considering the

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said Commissioner did not make any record or notation of the same nor did he follow any proceedings; make any record or do anything with reference to the alleged complaint. The next time the alleged complaint turned up was when the same was filed on May 1, 1956 in the Clerk's office of this Honorable Court. The said United States Commissioner did not file the alleged complaint in the District Court."

claim by retroactive extension of the statute. But this is not the case here, and this Court finds unpersuasive the notion that these defendants have a right to a four year statute. Neither is the due process argument compelling. While it is true that non-Government defendants have little control over the course of that litigation, no protected rights are prejudiced thereby. Regardless of the length of the Government proceedings, these defendants are not deprived of their day in court. It is claimed, however, that when that day finally arrives, non-Government defendants may be hampered by lack of evidence, since they would have no reason to preserve records during the pendency of the Government action. This assumes that a non-Government defendant would have no inkling that he might become a treble damage defendant, an assumption which seems unwarranted. Certainly a defendant would have enough familiarity with its own affairs to ascertain whether the potential exists that a treble damage claim will be asserted. Another contention is that if the statute is tolled for every member of any industry which is the subject of a Government suit, normal business activities will be hampered, particularly the sale of a business clouded with potential treble damage claims. This situation is not unique in the antitrust area and certainly it is not uncommon to arrange for assumptions and disclaimers of pre-existing liabilities in the sale of a business. None of these arguments suggest that tolling the statute for non-Government defendants will result in hardships of such magnitude that it is unreasonable to think that Congress intended this result. Rather, tolling the statute here promotes the Congressional desire to give private litigants every benefit to be culled from the Government litigation.

D. *Plaintiffs Benefited by § 5 (b)*—

Some of these actions are brought by representative plaintiffs on behalf of members of a class of governmental entities. Defendant International has taken the position, particularly with reference to the *Milwaukee* case, that the timeliness of actions by members of the class who subsequently intervene in a class action, is to be determined by reference to the date of the motion to intervene, or the Order granting such motion. In other words, it is International's position that the institution of a representative action does not mark the commencement of the suit for members of the class who thereafter seek to intervene in the action in their own name.

The significance of this problem is diminished by the conclusion that the Government action continued to pend for all defendants until October 26, 1965. Since the limitations period will not expire until October 25, 1966, all plaintiffs who have intervened heretofore are within the statute, even without relation back to the date on which the class action was commenced. Thus, it is unnecessary to consider this question. It might be noted, however, that *Union Carbide & Carbon Corporation v. Nisley,* 300 F. 2d 561 (10th Cir. 1962), a treble damage action, did consider the issue and held that institution of a class action served to toll the statute of limitations for all members of the class.

Additionally, this Court entered an Order closing the various classes involved in these actions as of a day certain. Class action representatives were also required to file lists of members for whom damages are claimed. Defendants are thereby protected from last minute additions to the class against whom they might not have formulated a defense.

E. *Matters Complained of—*

The foregoing discussion has assumed that the matters complained of in these private actions are based in whole or in part on the Government litigation within the meaning of § 5 (b). In *Leh,* the Court adopted a test of "substantial identity" and found that the private action was based on the Government suit even though there were differences in (a) defendants, (b) the time period of the conspiracies alleged, and (c) the geographic area involved, and (d) certain overt acts in furtherance of the alleged conspiracy.

It is not necessary to detail the allegations of these private complaints and the Government complaint, since defendants do not seriously question that the actions herein share a substantial identity with the Government proceedings. Combined, these plaintiffs focus on a geographic area wider than that involved in the Government action; they assert claims against defendants who were not parties to the Government suit, and some seek damages for a period beyond the scope of that to which the Government directed its attention. Despite these variances, the core of these complaints is an alleged conspiracy to fix the prices of rock salt sold to governmental entities. As such, the essence of these private actions is substantially similar to the matters complained of by the Government and thus within the scope of § 5 (b).

In summary, the Court has determined:

1. That the date which governs the commencement of the tolling of the statute of limitations under § 5 (b) of the Clayton Act is June 28, 1961.

2. That the date which governs the termination of the tolling of the statute of limitations under § 5 (b) of the Clayton Act is October 25, 1966.

3. That § 5 (b) of the Clayton Act applies to all defendants named in these treble damage actions.

4. That all plaintiffs, including intervenors and members of a class, are entitled to the benefits of § 5 (b).

5. That the matters complained of in these treble damage actions are based in whole or in part on the Government litigation within the meaning of § 5 (b).

It Is So Ordered.

July 28, 1966.

Earl R. Larson,
United States District Judge.

Certification.

The Court is of the opinion that the Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation.

July 28, 1966.

Earl R. Larson,
United States District Judge.

APPENDIX C.

§ 15b. Limitation of actions.

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and section 15a and 16 of this title shall be revived by said sections. Oct. 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283.

§ 16.

. . .

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued. Oct. 15, 1914, c. 323, § 5, 38 Stat. 731; July 7, 1955, c. 283, § 2, 69 Stat. 283.

SUPREME COURT, U. S.

No. 461

FILED
AUG 23 1967
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1967

HARDY SALT COMPANY,

Petitioner,

vs.

STATE OF ILLINOIS and
STATE OF WEST VIRGINIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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August 23, 1967

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OPINION BELOW

The opinion of the Court of Appeals is reported at 377 F. 2d 768.

STATEMENT

The facts of the case are fully and accurately set forth in the opinion of the Court below printed as Appendix A to the Petition, pages 7-21.

ARGUMENT

1. Involved here is the application of the clear language of Section 5(b) of the Clayton Act which provides in part that

> "the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency" of a federal antitrust proceeding and for one year thereafter.

2. The Petitioner, Hardy Salt Company, was specifically named as a co-conspirator in a federal indictment and federal civil complaint involving substantially the same price-fixing conspiracy as is charged in the instant treble damage antitrust suits filed by the States of Illinois and West Virginia. These private suits name Hardy as one of the defendants and the Eighth Circuit held the limitations statute had been suspended as to Hardy during the pendency of the federal action plus one year.

3. The circuit and district court decisions cited on page 4 of the Petition to support the assertion of conflict with the opinion and judgment of the Eighth Circuit here, were all decided prior to the 1955 amendment to Section 5 of the Clayton Act and prior to this Court's decisions in *Minnesota Mining* v. *New Jersey Wood F. Co.*, 381 U.S. 311 (1965) (hereinafter "3M") and *Leh* v. *General Petroleum Corp.*, 382 U.S. 54 (1965) (hereinafter "Leh"). The lower court decisions relied upon by Petitioner were all based on the faulty interpretation that the separate *prima facie* and limitations provisions of Section 5 were co-extensive, had to be construed together

and, therefore, the limitations provision was applicable only to those parties subject to the collateral estoppel effect of the evidentiary provision and thus confined to the specifically named defendants in the federal action.

4. Section 5 of the Clayton Act was amended in several respects in 1955 and the evidentiary and limitations provisions separated into Sections 5(a) and 5(b). This Court had occasion to consider Section 5(b) in the *3M* and *Leh* cases and corrected the erroneous premise that formed the basis of the circuit and district court decisions cited by Petitioner. In *3M*, this Court gave recognition to the strong Congressional purpose embodied in Section 5(b) "to assist private litigants in utilizing any benefits they might cull from government antitrust actions" (317) and stressed that "private antitrust litigation is one of the surest weapons for effective enforcement" (318). The Court further discussed the substantial textual differences of Sections 5(a) and 5(b) (316) and held that these two subsections "are governed by different considerations as well as congressional policy objectives" (318). That Section 5(b) serves a more comprehensive function which reaches "far beyond the specific and limited benefits accruing to them [private antitrust plaintiffs] under §5(a)" (320).

The Court in *Leh* dealt with the question of whether a private antitrust action was in whole or in part based upon matters complained of in a federal action. In that connection the Court rejected the necessity of a complete identity of parties in the federal and private actions in order to satisfy the requirements of Section 5(b) suspending the limitations statute and pointed out on page 64:

> "On the other hand, some of the conspirators whose activities injured the private claimant may have been

> too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net."

The suspension of the limitations statute as against a named co-conspirator though not a defendant in a federal proceeding was not directly involved in the *Leh* decision. The court, however, did determine that Section 5(b) suspension did accrue for private actions even though named co-conspirators were included in, or comprised the sole, private defendants. Obviously no Section 5(b) benefit could accrue unless the suspension was applicable to the federally named co-conspirators.

5. The decision of the Eighth Circuit follows and is in harmony with the statutory construction announced by this Court in *3M* and *Leh*. The faulty premise previously used to misconstrue and restrict the clear meaning of the language of Section 5(b) has been rejected. The issue involving the construction of Section 5(b) has been resolved by this Court in *3M* and *Leh*. As so resolved the Eighth Circuit has followed this Court's dictates. There is no reason for this Court now to re-examine the principles previously announced in *3M* and *Leh*.

6. Petitioner also calls to the Court's attention as a reason for granting the writ, the decision of the District Court for the District of New Jersey rendered on September 19, 1966, in *New Jersey* v. *Morton Salt Co.*, Civ. 687-65. In that case Judge Lane came to an opposite conclusion but based his decision on the fact that an earlier District Judge had so ruled. Judge Lane said: "[B]y comity and tradition, brother judges of a multiple-judge district court customarily follow a previous decision of a brother judge upon the same question." (Transcript of Hearing, September 19, 1966, pages 47-48.)

Judge Lane also stated: "Should higher authority adopt in whole or in part the conclusions that Judge Larson has reached, appropriate relief may be granted by this Court. . . ." (Transcript, *supra*, page 51).

The Petition for Certiorari should be denied.

Respectfully submitted,

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August 23, 1967.